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V.

POINTS TO BE RELIED UPON

The argument for the appellee will be made under the following points, to-wit:

POINT I.

The privilege license in this case is not a burden on interstate commerce.

POINT II.

In construing statutes in reference to interstate commerce the courts make a well defined distinction between statutes levying a tax and statutes regulating commerce.

POINT III.

A privilege tax levied upon a cotton buyer must be treated as in effect a tax upon the cotton purchased in determining questions arising under the Federal Constitution in reference to the power of the State to tax; that is to say, if the State could levy an ad valorem tax upon the cotton, then it could levy a privilege tax upon the person engaged in the business of buying such cotton.

POINT IV.

An ad valorem tax may be levied upon the cotton at any time before the cotton enters the channels of interstate commerce and a privilege tax may be levied upon the person engaged in the business of buying such cotton at any time before it enters the channels of such commerce.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 428.

H. CHASSANIOL,

Appellant,

VS.

CITY OF GREENWOOD,

Appellee

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

Briefly stated the facts shown by the record in this case are as follows:

Long staple coton is produced in what is known as the Mississippi Delta. The grower of this cotton after having it ginned, transports it to the compresses in the City of Greenwood by wagons, automobiles, trucks, and railroads. There the cotton is concentrated in one of the three compresses located in the City of Greenwood. The amount of cotton received at the compresses by railroad is about seventy-five per cent, and that received by automobiles, trucks, or wagons is about twenty-five per cent.

The concentration of this cotton in the compresses at Greenwood is primarily for the following reasons:

First, in order that it may be marketed at the best advantage.

Second, in order that the title to the cotton may be passed by the exchange of compress warehouse receipts.

Third, in order that it may be safely stored until finally shipped to its ultimate destination.

Fourth, in order that it may be compressed as a preparation for shipment.

The appellant, H. Chassaniol, is a cotton buyer in the City of Greenwood. He first enters into a contract for the FUTURE or IMMEDIATE delivery of a certain number of bales of cotton of a certain class, grade, and staple obligating himself by such contract to deliver to a mill in a foreign state or country such cotton at a given price. He then goes upon a market at Greenwood and purchases cotton of the kind and character which he is obligated to his customer to deliver and will deliver the cotton in accordance with the terms of his contract.

He also buys cotton for which he has no contract but which he INTENDS to sell to purchasers in another state or foreign country. He also buys a small amount of cotton which he sells on the local market to other buyers in Greenwood or which he MAY sell if he receives an order for the kind of cotton so bought and held by him.

There is an active market for the buying and selling of cotton in the City of Greenwood and the cotton so stored

in the compresses is placed there for an indefinite time and may be bought and sold a number of times before being actually shipped to its final destination.

The cotton so stored in the compresses in Greenwood becomes the property of the owner and holder of the warehouse receipt issued against such particular cotton and its owner may deal with it in any manner he desires. From this record it shows that the appellant after becoming the purchaser of any particular cotton may deal therewith as follows:

First, he may ship it to another state or foreign country immediately.

Second, he may hold it for an indefinite time UNDER HIS INTENTION to ship it to another state or foreign country.

Third, he may sell it to another buyer on the local market in Greenwood.

The record shows that the appellant did all three of these transactions.

For engaging in business of this kind, the appellant paid the City of Greenwood, the appellee, for privilege license fixed by the Ordinances shown by the record.

Record pages 13 and 17.

The appellant sought a refund of the privilege license paid to the City of Greenwood during the years 1931 and

1932 of Fifty Dollars ($50.00) each year. The Council of the City of Greenwood by its order denying this refund to the appellant determined the question of fact against the appellant. On Appeal to the Circuit Court of Leflore county, Mississippi, this finding of the Council of the City of Greenwood on the statements shown by the appellant's application was sustained, and the cause affirmed. The appellant then appealed to the Supreme Court of the State of Mississippi, and that Court affirmed the judgment of the Circuit Court of Leflore County, Mississippi.

H. Chassanoil v. City of Greenwood, 148 So. 781. (Not yet officially reported).

The appellant now brings this case to the Supreme Court of the United States by Appeal from the Supreme Court of the State of Mississippi.

BRIEF AND ARGUMENT

POINT I.

THE PRIVILEGE LICENSE IN THIS CASE IS NOT A BURDEN ON INTERSTATE COMMERCE.

The ordinance of the City of Greenwood adopted June 3, 1930, and shown on page 13 of the record was enacted under the authority of Chapter 88 of the Laws of Mississippi for 1930, and the Section thereof that statute is as follows:

> "Every person engaged in the business of buying or selling cotton for himself shall pay a privilege tax of one hundred ($100) dollars; but,

where a cotton buyer only buys cotton from one gin in only one county or buys from the producers in only one municipality, said privilege tax is twenty-five ($25) dollars; the license must be issued in his name, and may be paid on or before the first day of September for a full year; only the municipality of his residence can collect a municipal privilege tax of him. Every individual, firm, partnership or corporation engaged in the business of buying or selling cotton shall take out in his or their name a state privilege tax of twenty-five ($25) dollars for every employee engaged in their business as buyer or seller, on or before the first day of September; such privilege tax shall authorize the buying or selling cotton by its bearer; and it shall be unlawful for any employee to buy or sell cotton without a privilege tax in his possession, issued in the name of his employer. Such license cannot be issued for less than a year.

"If the individual, firm, partnership, or corporation take out a municipal privilege in his or their name for the municipality of the residence of their employee and take out also, the state privilege tax imposed on them above, such employee shall have the authority to buy or sell cotton in any other municipality of the state, without paying any further state or municipal privilege tax.

"But the above privilege taxes shall not be required of any landlord or other person who receives cotton in payment of accounts due him, nor of any merchant who pays a privilege tax on a store and who purchases only from the producer at the place of business of such merchant, nor to

cotton mills domiciled in Mississippi where the cotton is purchased for manufacturing purposes."

The ordinance complained of that was adopted June 7, 1932, was authorized by Chapter 89 of the Laws of Mississippi, for 1932 and under Section 62 thereof which is as follows:

"Upon every person engaged in the business of buying or selling cotton for himself, as follows:

When less than 2,500 bales are handled annually ..... $ 25.00

When 2,500 bales and less than 5,000 are handled annually ..... $ 50.00

When 5,000 bales or more are handled annually $100.00

Upon each person buying or selling cotton as an agent for a licensed cotton buyer $ 25.00

But this section shall not apply to any landlord, merchant, or other person who only receives cotton in payment of accounts due him, or to cotton mills domiciled in Mississippi where the cotton is purchased for manufacturing purposes."

The appellant complains only of these statutes and ordinances in that they violate Article 1, Section 8, Clause 3, of the Constitution of the United States and are a burden on interstate commerce.

By a general provision of each of the chapters of the laws of Mississippi as above stated enacting the privilege license laws of the State of Mississippi a municipality is

authorized to levy a privilege license tax of fifty per cent of the amount that the state may levy according to both of the above mentioned laws. The City of Greenwood levied fifty per cent of the amount against the appellant that the State of Mississippi could levy under each of the above cited laws for each of the said years.

There is nothing on the face of the statutes or the ordinances that indicates a contravention with the constitution of the United States or as interfering with interstate commerce. They are simple enactments by the Legislature of the State of Mississippi admittedly for State purposes. There is no doubt that the Legislature of the State of Mississippi had authority to enact such statutes.

> "*Pullman v. Adams Revenue Agent*, 70 Miss. 841, 30 So., 757, 84 Am. St. Rep. 647.
> So. 781.
>
> *H. Chassaniol v. City of Greenwood*, 148 So. 781.

When the Supreme Court of a state construes a state statute such construction is binding on the Supreme Court of the United States.

> *Anglo-Chilean Nitrate Sales Corp. v. State of Alabama*, 288 U. S. 218, 53 S. Ct. 377, 77 L. ed. 710.
>
> *Osborn v. Florida*, 164, U. S. 650, 41 L. ed. 586.

The Supreme Court of the State of Mississippi has construed the enactments of the Legislature of the State of Mississippi as applying only to intrastate business.

N. O. M. & C. Railroad Company v. State, 70 So. 355; *Pullman v. Adams Revenue Agt.* 78 Miss. 814, 30 So. 757, 84 Am. St. Rep. 647.

These particular ordinances and statutes were construed by the Supreme Court of the State of Mississippi in the case of *H. Chassaniol v. City of Greenwood*, 148 So., 781, and were held to apply only to intrastate commerce.

It is to be noted that the appellant H. Chassaniol is a resident of the City of Greenwood, Leflore County, Mississippi. He buys cotton in the City of Greenwood for his own account to which he takes title. He intends to ship this cotton which he owns and which is at rest in one or more of the compresses in the City of Greenwood. In the Chassaniol case, supra, the court said:

> "The Supreme Court of the United States held as to cotton so stored that it does not become part of interstate commerce. The beginning of interstate commerce is the time when the goods begin their interstate journey thus passing beyond the state's authority, and the domestic or Federal control. *Lemke v. Farmers' Grain Company*, 258 U. S. 50, 42 S. Ct. 244, 60 L. Ed. 458; *Schafer v. Farmers, Grain Co.*, 268 U. S. 189, 45 S. Ct. 481, 69 L. Ed. 909; *General Oil Co. v. Crain*, 209, U. S. 211, 28 S. Ct. 475, 52 L. ed. 754; *McCluskey v. Marysville & N. R. Co.*, 243 U. S. 36, 37 S. Ct. 374, 61 L. ed. 579; *Hammer v. Dagenhart*, 247 U. S. 251, 38 S. Ct. 529, 62 L. ed. 1101, 3. A. L. R. 649, Ann. Cas. 1918 E, 724."

"The essential character of commerce, not the accident of through bills of lading, is its continuity of movement in foreign commerce, and that determines federal or state control over it. And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country.

R. R. Commission v. Texas & P. R. Co., 229 U. S. 336, 33 S. Ct. 837, 57 L. ed. 1215. See, also, *I. C. R. R. Co. v. DeFuentes*, 236 U. S. 157, 35 S. Ct. 275, 59 L. Ed. 517, and *R. R. Com. of Ohio v. Worthington*, 225 U. S. 101, 32 S. Ct. 653, 56 L. Ed. 1004."

The appellant is not buying for his principal who lives in another state, but is buying for himself with the intention to ship into another state. If the appellant here was a citizen of another state or foreign country and came into the State of Mississippi and the City of Greenwood to buy and immediately ship cotton to himself or to another in another state or foreign country, then the situation would be entirely different.

In the case of *Dahnke-Walker Milling Company vs. Bondurant*, 257 U. S. 282, 66 L. Ed. 239, the Court had before it the fact of a citizen of one state going into another state for the purpose of buying wheat which was to be delivered to him on both cars of a common carrier and there shipped to his mills in the other state. The Court properly held this to be interstate commerce, the journey from the state having actually begun.

In this case the cotton purchased by the appellant was still a part of the mass of property in this state and the interstate movement had not begun; in fact, the record shows that he bought for future as well as immediate delivery and certainly the cotton purchased by the appellant for future delivery could not be said to be in interstate commerce.

"If the interstate movement has not begun the mere fact that such a movement is contemplated does not withdraw the property from the state's power to tax it.

Coe vs. Errol, 116 U. S. 517, 29 L. Ed. 715, 6 S. Ct. 475; *Diamond Match Company vs. Ontonagon,* 108 U. S. 82, 47 L. Ed. 394, 23 S. Ct. 262.

State of Minn. vs. Geo. Blasius, 78 L. Ed., Page 19, Supreme Court Advanced Opinions.

"But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of the State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely: That such goods do not cease to be part of the general mass of property in the State, subject as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or a herd is

exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule, in many States there would be nothing but the lands and real estate to bear the taxes. Some of the Western States produce very little, except wheat and corn, most of which is intended for export; and so of cotton in the southern states. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the state. And so we think they continue to be until they have entered upon their final journey for leaving the state and going into another state. It is true, it was said in the case of 'The Daniel Ball; 10 Wall. 565 (77 U. S. bk. 19, L. Ed. 1002); 'Whenever a commodity has begun to *move as an article of trade* from one state to another, commerce in that commodity between the states has commenced. But this move ment does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm or the forest to the depot is only an interior movement of the property, entirely within the state, for the pur-

pose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is a matter altogether in fieri, and not at all a fixed and certain thing."

"Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6. S. Ct. 475.

"No state can tax an export or an import as such, except under the limitations of the Constitution. But before the article becomes an export, or after it ceases to be an import, by being mingled with other property in the state, it is a subject of taxation by the state. *A cotton broker may be required to pay a tax upon his business or by way of license, although he may buy and sell cotton for foreign exportation."* (Italics ours).

Nathan vs. State of Louisiana, 8 Howard, 63, 12 L. Ed. 992.

"In *Carson Petroleum Company vs. Vial,* 279 U. S. 94, 73 L. Ed. 623, Text 629, the Supreme Court held as follows: *'In Hughes Brothers Timber Company vs. Minn.,* 272 U. S. 469, 71 L. Ed. 359, 47 Sup. Ct. Rep. 170, pursuant to a contract of sale of logs cut were gathered on the Swamp River in Minn. by the vendors and were floated by river to Lake Superior, and there loaded on to the vendee's vessels and transported to their district in Michigan. This court said:

"That the conclusion in cases like this must be determined from the various circumstances. *Mere intention by the owner ultimately to send* the logs out of the state does not put them in in-

terstate commerce, nor does preparatory gathering for that purpose at a depot. It must appear that the movement for another state has actually begun and is going on. Solution is easy when the shipment has been delivered to a carrier for a destination in another state."

(Italics Ours).

The beginning of the transit which conducts interstate commerce is the point of time that an article is committed to the carrier for transportation, to the state of its destination or started on its ultimate passage.

McCluskey v. Marysville 61 L. ed. 578; *General Oil Co. v. Crain*, 52 L. ed. 754; *Atlantic Coast Line Railroad Co. v. Standard Oil Co.* 72 L. ed. 270; *Diamond Match Co. v. Village of Ontonagon*, 188 U. S. 82, 47 L. ed. 394.

The case of *Stafford v. Wallace*, 258 U. S. 495, 66 L. ed. 735, involved the question of whether Congress had the power to enact the Packers and Stockyard Act of August 15th, 1921, and an interlocutory injunction was applied for and refused by the District Federal Court in which suit it was sought to restrain the enforcement of orders of the Secretary of Agriculture in aid of said Act. The Supreme Court of the United States upheld the Packers and Stockyard Act, stating that Congress had the power under the Commerce Clause of the Constitution to enact an appropriate Legislation governing the subject matter of this suit. Congress had never attempted to enact any Legislation effecting the buying and selling of cotton. If Congress should enact such a law, and the validity of such act

were brought before the Supreme Court of the United States under appropriate facts, then the case of *Stafford v. Wallace* might apply.

We are unable to see how the decision in the case of *Stafford v. Wallace* can apply to the cases at bar. The one construes a Federal Act, and the power of Congress to enact it regarding interstate commerce. The other is a simple privilege license tax included in a chapter of the Mississippi Code on Privilege License and passed admittedly for state purposes.

New Orleans, Mobile and Chicago Railroad Company v. State, 110 Miss. 290, 70 So 355.

In *Bacon v. State of Illinois*, 227 U. S. 502, 57 L. ed. 615 no part of the grain mentioned in the said case was sold or consumed in Illinois, but while it passed through the City of Chicago from the Southern and Western States to the Eastern States, it was made subject to an advalorem tax and as to the right of the State of Illinois to levy this tax the court said:

> "But neither the fact that the grain had come from outside the state, nor the intention of the owner to send it to another state, and there to dispose of it, can be deemed controlling when the taxing power of the state of Illinois is concerned. The property was held by the plaintiff in error in Chicago for his own purpose and with full power of disposition. It was not being actually transported, and it was not held by carriers for transportation. The plaintiff in error had withdrawn it from the carriers. The purpose of the with-

drawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not, as he chose. He might sell the grain in Illinois or forward it, as he saw fit. It was in his possession, with the control of absolute ownership. He intended to forword the grain after it had been inspeected, graded, etc., but this intention, while the grain remained in his keeping, and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago, for his own benefit, and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the state in an assessment for taxation which was made in the usual way, without discrimination.

Woodruff v. Parham, 8 Wall. 123, 19, L. Ed. 382; *Brown v. Houston*, 114 U. S. 622, 29 L. Ed. 257, 5 sup Ct. Rep. 1091; *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. Rep. 475; *Pittsburg & S. Coal Company v. Bates*, 156 U. S. 577, 39 L. Ed. 538, 6 Inters. Com Rep. 30, 15 Sup. Ct. Rep. 415; *Diamond Mach Co. v. Ontonagon*, 188 U. S. 82. 93-96, 47 L. ed. 394, 398, 400, 23 Sup. Ct. Rep. 365; *General Oil Co. v. Crain*, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475."

Therefore, in this case the appellant had possession of the property that he had purchased in the City of Greenwood as a cotton buyer. He alleges in his petition that he intended to ship this cotton to other states, but the court

in the Bacon case held that his intention did not make it immune from local taxation. If this principle is applied to an advalorem tax for the payment which the goods itself are liable to be distrained, how much more effectively it would apply to a privilege license which could not be levied against the cotton itself.

The appellant in this case in the City of Greenwood did as Bacon himself did in the City of Chicago; that is, he established a local facility in Greenwood for his own benefit and carried a stock of ten per cent (10%) of his business on hand at all times, not for the benefit of interstate commerce, but for the benefit of his own profit.

In a very recent case styled *Nashville, Chattanooga and St. Louis Railroad Company vs. Wallace*, decided by the Supreme Court of the United States, February 6th, 1933, and reported on page 447 of Advance Sheet No. 8 of the United States Supreme Court Advance Opinions of 77 L. ed. That court has this to say:

> "Appellant, an interstate rail carrier, purchased large quantities of gasoline outside the state of Tennessee and brings it into the state in tank cars from which it is unloaded and placed in its own storage tanks. None of it is sold by appellant, but all is withdrawn and used by it as a source of motive power in interstate railway operation in Tennessee, Kentucky, Alabama and Georgia. Storage of the gasoline is a preliminary step to such use in interstate commerce. The tax is assailed both on the ground that it is imposed on the gasoline while still a subject of interstate commerce in the course of transportation from

points of irigin to points outside the State of Tennessee; and on the ground that it is in effect a tax upon the use of the gasoline in appellant's business as an interstate carrier, and is thus an unconstitutional burden on interstate commerce.

The gasoline, upon being unloaded and stored, ceased to be subject of transportation in interstate commerce and lost its immunity as such from state taxation.

"*General Oil Company v. Crain*, 209 U. S. 211, 52 L. ed. 754, 28 S. Ct. 475; *Bacon v. Illinois*, 227 U. S. 504, 57 L. ed. 615, 33 S. Ct. 299; *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 665, 669. 57 L. ed. 1015, 1016, 33 S. Ct. 712; *Hart Refineries v. Harmon*, 278 U. S. 499, 73 L. ed. 475, 49 S. Ct. 188; *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 76 L. ed. 1232, 52 S. Ct. 631,—A.L.R.—. The fact that the oil was, in the ordinary course of appellant's business, later withdrawn from storage for use, some within and some without the state, part of it thus becoming again the subject of interstate transportation, did not affect the power of the state to tax it all before that transportation commenced. Neither the appellant, the shippers, nor the carrier, at the time of the shipment of the gasoline from points of origin, arranged a destination for any part of the oil other than the appellant's storage tanks in Tennessee. Although in the usual course of business a variable and undefined part of it, when segregated for that purpose, would again be transported across state boundaries, appellant was free to distribute the oil either within or without the state for use in its business or for any other purpose. As nothing in the transaction before the with-

drawal from storage in Tennessee can be said to have given any ascertainable part of the gasoline a destination to points beyond the state, the case is distinguishable from *Carson Petroleum Co. v. Vial*, 279 U. S. 95, 73 L. ed. 626, 49 S. Ct. 292, and *Texas & N. O. R. Co. v. Sabine Tram. Co.* 227 U. S. 111, 57 L. ed. 442, 33 S. Ct. 229. The oil in storage was not a subject of interstate commerce and so was a part of the common mass of goods within the state, subject to local taxation.

General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 S. Ct. 475; *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 655, 57 L. ed. 1015, 33 S. Ct. 712, and *Bacon v. Illinois*, 227 U. S. 504, 57 L. ed. 615; 33 S. Ct. 299 supra; compare *Atlantic Coast Line R. Co. v. Standard Oil Co.* 275 U.S 257, 72 L. ed. 270, 48 S. Ct. 107.

In the case of *Bowman vs. Continental Oil Co.* this Court declared invalid revenue tax that was imposed finally upon entire business conducted, including interstate commerce as well as domestic, but this decision of this Court was rendered before the Supreme Court of New Mexico had construed such a tax as applying only to intrastate commerce. In the opinion in this case the Court said:

> "Upon the question of severability, we are constrained to concur in the view adopted by the district court; and this, notwithstanding our hesitation, in advance of a declaration by the court of last resort of the state, to adopt a construction bringing the law into conflict with the Federal Constitution."

Ohio Tax Cases, 232 U. S. 576, 591, 58 L. ed. 738, 745, 34, Sup. Ct. Rep. 372; *St. Louis*

Southwestern R. Co. v. Arkansas, 235 U. S. 350, 369, 370 59 L. ed. 265, 274, 275, 35 Sup. Ct. Rep. 99."

The appellant relies very strongly upon *Lemke vs. Farmers Grain Company*, 258 U. S. 50, 66 L. Ed. 458, and *Shafer vs. Farmers Grain Company*, 268 U. S. 189, 69 L. ed. 909.

These cases set forth an effort on the part of the Legislature of North Dakota to enact a very comprehensive scheme to regulate the buying and selling of wheat in North Dakota and impose stringent regulations calculated to embarass and impede the shipment of grain from the state. There was practically no market in North Dakota for the grain purchased by the complainant in the Lemke case and the salient parts of the complete statute under attack in that case are set out within the report of the Lemke case. Such a statute cannot be compared with the statute of the State of Mississippi and the ordinances of the City of Greenwood here under consideration.

The grain in the Lemke and Shafer cases was bought for the purpose of shipping them and selling in terminal markets outside of the State of North Dakota. The wheat was bought from the producers and placed in cars for immediate shipment to the terminal market in another state. In the case at bar the cotton is bought by a resident of this state who places it not immediately on bought carriers for interstate shipment, but in compresses to await a time when he desires to ship the cotton. The buyers in the Lemke and Shafer cases are not shown to trade among themselves or to carry any stock for their own profit. The

appellant in this case at bar shows by his petition that he carries ten per cent which he uses for his own benefit and profit. There is no showing that there is any difference so far as the shipping of cotton in interstate commerce is concerned of the ten per cent of appellant's business is engaged in interstate commerce; that is, the handling of the ten per cent does not reduce the profit on the ninety per cent in intertsate commerce.

I, therefore, submit that the privilege tax complained of is not a burden on interstate commerce within the meaning of the Constitution of the United States.

POINT II.

IN CONSTRUING STATUTES IN REFERENCE TO INTERSTATE COMMERCE THIS COURT MAKES A WELL DEFINED DISTINCTION BETWEEN STATUTES LEVYING A TAX AND STATUTES REGULATING COMMERCE.

BRIEF RESUME OF FACTS

The facts as reflected by the record, briefly stated, are as follows:

Long staple cotton is produced in the Mississippi Delta The producer, after having the cotton ginned, transports it to the compress at Greenwood by wagons, automobiles, trucks and railroads.

The cotton is concentrated at the compress at Greenwood for the following reasons:

First: In order that it may be marketed to the best advantage.

Second: In order that the title to the cotton may pass by the exchange of compress receipts.

Third: In order that it may be safely stored until finally shipped from the State.

Fourth: In order that it may be compressed as a preparation for shipping.

The appellant, as a cotton buyer, purchases said cotton under three different circumstances, to wit:

1. He purchases cotton in order to fill a contract entered into prior to its purchase, in which contract he is obligated to deliver said cotton in another state or foreign country.

2. He buys cotton for which he has no contract but with the intention and for the purpose of selling said cotton to purchasers in another state or foreign country.

3. As an incident to his business of buying cotton to be shipped in interstate and foreign commerce, he buys cotton which he sells on the local market.

The cotton is handled as follows:

1. It is stored in the warehouse by the producer or the purchaser for an indefinite time.

2. While so stored it may be bought and sold one or more times.

3. Its final destination is determined by final sale to purchasers outside of the State.

4. After its final destination is determined it is compressed and then delivered to the common carrier.

In the case of *Lemke v. Farmers Grain Co.*, 258 U. S. 50, 66 L. Ed. 458, a case cited and relied upon by counsel for appellants, the Court, after holding that under the facts in that case the grain buyers were engaged in interstate commerce, held as follows:

> "Nor is this conclusion opposed by cases decided in this court and relied upon by appellants, in which we have had occasion to define the line between the state and Federal authority under facts presented, which required a definition of interstate commerce where the right of state taxation was involved, or manufacture or commerce of an intrastate character was the subject of consideration. In those cases we have defined the beginning of interstate commerce as that time when goods begin their interstate journey by delivery to a carrier or otherwise, thus passing beyond state authority into the domain of Federal control. Cases of that type are not in conflict with principles recognized as controlling here."

In the case of *Sonneborn Bros. vs. Keeling*, 262 U. S. 506, 67 L. Ed. 1095, the Court held as follows:

> "Counsel for appellants cite the case of *Dahnke-Walker Mill Co. v. Bondurant*, 257 U. S. 282, 290, 66 L. ed. 239, 244, 42 Sup. Ct. Rep. 106, as aiding their argument that a tax on a sale of merchandise in an original package, brought

from another state, is a tax on interstate commerce, and is different from an ad valorem property tax on the merchandise. But that case was not concerned with the power to tax, but rather with the power of a state to prevent an engagement in interstate commerce within her limits, except by her leave. The holding there was that a contract for the purchase of a crop of grain in Kentucky, to be delivered at a railway station in Kentucky, for shipment to Tennesse, conformably to a settled course of business, was an interstate contract which a corporation not authorized by Kentucky to do business in that state might nevertheless make and enforce without incurring the penalty of the state law. It was said in that case (p. 290) that 'where goods in one state are transported into another state for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. *Brown v. Maryland*, 12 Wheat. 419, 446, 447, 6 L. ed. 678, 688; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 519, 48 L. Ed. 538, 546, 24 Sup. Ct. Rep. 365. On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. *American Express Co. v. Iowa*, 196 U. S. 133, 143, 49 L. ed. 417, 422, 25 Sup. Ct. Rep. 182.' But this language has no relevency to show that a tax without discrimination on goods, after the transportation ceases, is a burden on interstate commerce—a proposition negatived in the American Steel & Wire Co. case it cites—or that a different rule should apply to an

advalorem property tax from that in case of a tax on sales."

POINT III.

A PRIVILEGE TAX LEVIED UPON A COTTON BUYER MUST BE TREATED AS IN EFFECT A TAX UPON THE COTTON PURCHASED IN DETERMINING QUESTIONS ARISING UNDER THE FEDERAL CONSTITUTION IN REFERENCE TO THE POWER OF THE STATE TO TAX; THAT IS TO SAY, IF THE STATE COULD LEVY AN AD VALOREM TAX UPON THE COTTON, THEN IT COULD LEVY A PRIVILEGE TAX UPON THE PERSON ENGAGED IN THE BUSINESS OF BUYING SUCH COTTON.

I presume that it wil be conceded that lint cotton or bales of cotton in the State of Mississippi stored in the compress, as set out in the petition in this case, could be taxed as other property in the State is taxed for ad valorem taxes. In fact, all lint cotton in the State on the first day of January of each year would be subject to ad valorem tax for said year, if it were not for the exemption granted by paragraph (I) of Section 3108, Code of 1930.

Until the cotton is actually delivered to the railroad company for transportation beyond the confines of the State the cotton is a part of the general mass of property in the State of Mississippi.

In the case of *Federal Compress & Warehouse Co. vs. E. R. McLean*, Sheriff, No. 30,543, recently decided by Division A, not yet officially reported, the Court holds as follows:

"The cotton, moving through the appellant's warehouse and compress, entered into, and became a part of, interstate commerce when, but not until, it commenced its journey from this state to another state or country; in other words, when the cotton was delivered to the railroad company for transportation into another state or country. This did not occur until it was delivered to the railroad, after being compressed, for transportation. *Coe v. Errol*, 115 U. S. 519, 29 L. Ed. 74; *Diamond Match Co. v. Village of Ontonagon*, 188 U. S. 82, 47 L. Ed. 394."

The question involved in the Federal Court case of *Coe v. Errol and the case of Diamond Match Co. v. Village*, etc., supra, cited by the Supreme Court of Mississippi in the above styled cause was whether or not the State could levy an ad valorem tax on the property involved in the controversy. In this connection see also the following cases:

Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 67 L. Ed. 929;

Hope Natural Gas Co. v. Hall, 274 U. S. 284, 71 L. Ed. 1049;

American Manufacturing Co. v. City of St. Louis, 250 U. S. 459, 63 L. Ed. 1084;

Carson Petroleum Co. v. Vial, 279 U. S. 94, 73 L. Ed. 626;

Hughes Brothers Timber Co. v. Minnesota, 272 U. S. 469, 71 L. Ed. 359;

Atlantic Coast Line Ry. Co. v. Standard Oil Co., 72 L. Ed. 270.

In *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715, logs cut in the State of Maine, and others cut in the State of New Hampshire, were floated, in course of transit, down a stream in New Hampshire to the town of Errol in the later state, thence to be floated down another stream or river into the state of Maine. The town of Errol assessed upon the property a county, town, school and highway tax. The tax was sustained by the Supreme Court of the State of New Hampshire as to the logs cut in that state, and abated as to those cut in Maine. The judgment was affirmed by the Supreme Court of the United States. In disposing of the question, Mr. Justice Bradley used the following language:

> "When the products of the farm or forest are collected and brought in from the surrounding county to a town or statian serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination or have started on their ultimate passage to that stage.* * * *
>
> "That such goods do not cease to be part of the general mass of property in the state, subject to such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another state or have been started upon such transportation in a continuous route or journey. * * * *. It was said in the case of *The Daniel Ball*, 10 Wall. 565 (77 U. S. bk. 19, L. ed. 1002): 'Whenever a commodity has begun to move as an article

of trade from one state to another, commerce in that commodity between the states has commenced.

"But this movement does not begin until the articles have been shipped or started for transportation from one state to the other. The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm or the forest to the depot is only an interior movement of the property, entirely within the state, for that purpose, it is true, but only for the purpose of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is a matter altogether in fieri, and not at all a fixed and certain thing."

In *Diamond Match Company v. Village of Ontonagon*, 188 U. S. 81, 47 L. ed. 394, a bill in equity was filed to restrain the collection of a tax levied under the laws of the State of Michigan. The complainant was a corporation organized and existing under the laws of the State of Illinois, with its principal place of business in the City of Chicago in said state. It was the owner of a large quantity of pine wood, timber, etc., in Ontonagon and other counties

in the State of Michigan. It also owned saw mills located at Ontonagon, Michigan, and at Green Bay, Wisconsin, logs were cut from the forest or floated down the Ontonagon River to its mills at Ontonagon to be manufactured into lumber. In August, 1896, complainant's mills at Ontonagon burned; whereupon, the logs were transported by railroad to Green Bay, Wisconsin, to complainant's mill there located. The complainant contended that the property was in course of transportation in interstate commerce and that the Village of Ontonagon had no authority to levy the tax.

The court in deciding the case quoted with approval from the opinion of *Coe v. Errol*, supra, and in addition, said:

> "Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey. * * * *.
>
> "In further specialization of these propositions we may say that the cases establish that there may be an interior movement of property which does not constitute interstate commerce, though property come from or be destined to another state. In the one case, though it has not reached its place of disembarkation or delivery it may be taxed. 114 U. S. 622, 29 L. ed. 257, 5

Sup. Ct. Rep. 1091. In the other case, until it be shipped or started on its final journey it may be taxed. 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475."

In *American Manufacturing Company v. St. Louis*, 250 U. S. 459, 63 L. ed. 1084, a statute of the state of Missouri authorized cities to license, tax and regulate manufacturers. In pursuance to this authority, by the ordinance brought in question, in addition to an ad valorem tax, required every manufacturer before doing business to take out a license and thereafter pay a license tax of One Dollar on each $1,000.00 of sales made. A suit was brought in the state court to recover the amount of the tax paid, under the ordinance measured by the amount of sales of goods manufactured in the city and afterwards removed to storage warehouses outside of the state and later sold in other states than Missouri. A judgment at first was given in favor of plaintiff but being reversed by the State Supreme Court, a new trial resulted in favor of the city.

In construing the statute and defining the nature of the tax the State Supreme Court of Missouri, in 198 S. W. 1183, used the following language.

> "We hold that the tax in question is a tax upon the privilege of pursuing the business of manufacturing these goods in the City of St. Louis; * * *."

In affirming the case the Supreme Court of the United States quoted from the opinion of the Supreme Court of Missouri, and further approved the validity of the tax by saying:

"In our opinion the operation and effect of the taxing ordinance are to impose a legitimate burden upon the business of carrying on the manufacture of goods in the city; it produces no direct burden on commerce in the goods manufactured, whether domestic or interstate, and only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government. Therefore, it does not amount to a regulation of interstate commerce. * * *." 250 U. S. 459, 63 L. ed. 1084."

In *Crescent Cotton Oil Company v. State of Mississippi*, 257 U. S. 129, 66 L. ed. ~~166~~, it was held that a non-resident corporation operating a cotton seed oil mill in its home state and cotton gins in Mississippi, and shipping out of Mississippi for use in its oil mills in another state, all of the cotton seed which it purchased in connection with its ginning operations did not make it, by reason of such operation, an instrumentality of interstate commerce, so as to invalidate Mississippi's "anti gin" statute prohibiting any corporation from owning gins where such corporations were interested in the manufacture of cotton seed oil or cotton seed meal. In delivering the opinion, the court said:

"When the ginning is completed, the operator of the gin is free to purchase the seed or not; and, if it is purchased, to store it in Mississippi indefinitely, or to sell or use it in that state, or to ship it out of the state for use in another; and, under the cases cited, it is only in this last case, and after the seed has been committed to a carrier for interstate transport, that it passes from the regulatory power of the state into interstate commerce and under the national power."

In *Carson Petroleum Co. v. Vial*, 279 U. S. 94, 73 L. ed 626, the Supreme Court held as follows:

> "The conclusion in cases like this must be determined from the various circumstances. Mere intention by the owner to send the logs out of the state does not put them in interstate commerce, nor does preparatory gathering for that purpose, at a depot. It must appear that the movement for another state has actually begun and is going on. Solution is easy when the shipment has been delivered to a carrier for a destination in another state."

The court in discussing when a commodity is in the channels of interstate commerce, said further:

> "An instance of interruptions of railroad transportation is *Bacon v. Illinois*, 227 U. S. 504, 57 L. ed. 615, 33 Sup. Ct. Rep. 299. Bacon, the owner of the grain, and the taxpayer, had bought it in the South and had secured the right from the railroads transporting it to remove it from their custody to his private grain elevator in Illinois where for his own purpose he proceeded to inspect, weigh, clean, clip, dry, sack, grade, or mix it, and had power under his contract with the carriers either to change its ownership, consignee or destination or to restore the grain, after the processes mentioned, to the carrier to be delivered at the destination in another state according to his original intention. The question was whether the removal of the grain to his private elevator interrupted the continuity of the transportation and made the grain subject to local taxation there. It was held that it did; that the

> grain was locally dealt with in the interest of the owner while it was in his custody and was subject to his complete disposition for a collateral business purpose of his own."

Therefore, the point of time when a commodity enters the channels of interstate commerce, is the time when an article of commerce is committed to the carrier for transportation to the state of its ultimate destination.

In *McCluskey v. Marysville*, 243 U. S. 36, 61 L. ed. 578, the court used the following words:

> "The beginning of the transit which constitutes interstate commerce 'is defined in *Coe v. Errol* to be the point of time that an article is committed to a carrier for transportation to the state of its destination, or started on its ultimate passage.'"

In *General Oil Company vs. Crain*, 209 U. S. 212, 52 L. ed. 754, it was held that oil shipped from Pennsylvania and destined ultimately for points in Arkansas, Louisiana and Mississippi, is not property in interstate commerce, so as to be exempt from State taxation or inspection laws while it is held at a distributing point maintained by the shippers in Tennessee, at which point such oil is unloaded from tank cars into various tanks, barrels and other receptacles and from which it is forwarded to its final destination. The court said:

> "Property, therefore, at an intermediate point between the places of shipment and ultimate destination, may cease to be a subject of interstate commerce. Necessarily, however, the

length and purpose of the interruption of transit must be considered. * * * *

"We have considered this case so far in view of the cases which involve the power of taxation. It may be that such power is more limited than the power to enact inspection laws. *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 356, 43 L. ed. 195; 18 Sup. Ct. Rep. 862. The difference, if any exists, it is not necessary to observe. The cases based on the taxing power show the contentions of plaintiff in error are without merit; in other words, show that its oil was not property in interstate commerce."

In *Merchants Exchange of St. Louis v. State of Missouri on the Relation of John T. Barker, Attorney General*, 248 U. S. 365, 63 L. ed. 300, the Supreme Court held that a statute of Missouri providing that in cities having more than 75,000 inhabitants, buildings used for the storage of grain be deemed public warehouses, and prohibiting the issuance of weight certificates by other than authorized, bonded state weighers, did not violate the Constitution of the United States. The court said:

"Section 63 does not violate the commerce clause of the Constitution. The contention that it does was rested below solely on the ground that the prohibition, as applied to grain received from or shipped to points without the state, burdens interstate commerce. It clearly does not. *Pittsburg & S. Coal Co. v. Louisiana*, 156 U. S. 590, 39 L. ed. 544, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423. But the additional contention is made here that all state

regulation of the weighing of grain was superseded by the United States Grain Standards Act, approved August 11, 1916 (39 Stat. at L. 482, chap. 313.) That act (which is part B of Chapter 313) relates exclusively to the establishment by the Secretary of Agriculture of standards of quality and condition. It does not in any way refer to the weighing of grain. And part B of chapter 313 by Sec. 7 (p. 484), like part C, the United States Warehouse Act (which does contain some reference to weighing), by Section 29 (p. 490), makes manifest the purpose of Congress not to supersede state laws for the inspection and weighing of grain, but to co-operate with state officials charged with the enforcement of such state laws. The Missouri act is not superseded by or in conflict with the Federal Legislation."

In *Hope Natural Gas Company v. Hall, State Tax Commissioner of West Virginia, et al,* 274 U. S. 284, 71 L. ed. 1049, the Supreme Court upheld a statute of the State of West Virginia levying an occupation tax on persons engaged in producing for sale natural gas. The Gas Company was engaged in producing natural gas in West Virginia and was transporting it directly from the well to another state where it was sold. The Supreme Court held that the statute did not violate the Federal Constitution.

In *Oliver Iron Mining Company v. Lord,* 262 U. S. 172, 67 L. ed. 929, the statute of Minnesota levied a tax upon each person "engaged in the business of producing iron ore or other ores." The plaintiff was engaged in mining ore and loading it on cars and shipping it in interstate com-

merce. The statute was upheld and in so doing the court said:

> "We shall therefore treat the tax as an occupation tax in dealing with the contentions presented.
>
> "The chief contention is that mining, as conducted by the plaintiffs, if not actually a part of interstate commerce, is so closely connected therewith that to tax it is to burden or interfere with such commerce, which a state cannot do consistently with the commerce clause of the Constitution of the United States.
>
> "The facts on which the contention rests are as follows: The demand or market within the state for iron ore covers only a negligible percentage of what is mined by the plaintiffs. Practically all of their output is mined to fill existing contracts with consumers outside the state and passes at once into the channels of interstate commerce. Three-fourths of it is from open-pit mines and one-fourth from underground mines. At the open-pit mines, empty cars are run from adjacent railroad yards into the mines and there loaded. Steam shovels sever the ore from its natural bed and lift it directly into the cars. When loaded the cars are promptly returned to the railroad yards, where they are put into the trains which start the ore on its interstate journey. The several steps follow in such succession that there is practically continuity of movement from the time the ore is severed from its natural bed. The operations within the mine and the movement of the cars into and out of the mine are conducted by the plaintiffs. The subsequent transporta-

tion is by public carriers. At the underground mines the plaintiffs dig the ore, bring it to the surface through shafts, and put it in elevated pockets where it readily can be loaded into the cars. The subsequent movements are much the same as at the open-pit mines, but their continuity is not so pronounced. Some of the ore from both kinds of mines—between 10 and 20 per cent—is concentrated by washing or beneficiated after coming out of the mine and before starting out of the state; but our conclusion respecting the usual operations renders this deflection immaterial. * * * *

"The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally affect such commerce, just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference."

In *Philadelphia and Reading Railroad Co. v. Commonwealth of Pennsylvania*, 82 U. S. 164, the Court held as follows:

"No doubt every tax upon personal property or upon occupations, business or franchises, affects more or less the subjects and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution. * * * *

"The tax is laid upon the gross receipts of the Company; laid upon a fund which has become the property of the Company, mingled with its other property, and possibly expended in improvements

> or put out at interest. The statute does not look beyond the corporation to those who may have contributed to its treasury."

We have already stated in the *Natural Gas Company* and *Oliver Iron Mining Company* cases, supra, it appears that the plintiffs bought the gas and coal before it was produced, and that they bought it for the purpose of selling it in interstate commerce, and did so sell it. However, the court held squarely that the mining of the coal and the production of the gas was not interstate commerce and upheld the constitutionality of the statutes imposing an occupation tax on the gas company and the coal company.

Rowland C. Heisler v. Thomas Colliery Co., et al, 260 U. S. 245, 67 L. Ed. 237, was presented on a writ of error to the Supreme Court of the State of Pennsylvania to review a judgment affirming a judgment of the Court of Common Pleas, dismissing a suit brought to enjoin the enforcement and payment of a tax on anthracite coal.

In 1921 the commonwealth passed an Act providing that from and after its passage, each ton of anthracite coal mined, washed or screened, or otherwise prepared for market in the commonwealth, should be subject to a tax of one and one-half per cent of the value thereof, when prepared for market. The bill filed by plaintiff in error assailed the Act of 1921 as being offensive to the Fourteenth Amendment to the Constitution of the United States, also the right of the State to impose the tax, as being a regulation of interstate commerce, protected by the commerce clause of the Federal Constitution.

In disposing of the case with reference to whether or not said statute violated the interstate commerce clause of the Federal Constitution the court said:

> "We may, therefore, disregard the adventitious considerations referred to and their confusion, and, by doing so, we can estimate the contention made. It is that the products of a state that have, or are destined to have, a market in other states, are subjects of interstate commerce, though they have not removed from the place of their production or preparation.
>
> "The reach and consequence of the contention repel its acceptance. If the possibility, or, indeed, certainity, of exportation of a product or article from a state, it would seem to follow that it is in such commerce from the instant of its growth or production; and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries; it would nationalize and withdraw from state jurisdiction and deliver to Federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts, and the woolen industries of other states at the very inception of their production or growth; that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are, in varying percentages, destined for and surely to be exported to states other than those of their production.
>
> "Other cases have decided the same and afford illustrations of it. *Cornell v .Coyne,* 192

U. S. 418, 48 L. ed. 504, 24 Sup. Ct. Rep. 383; *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 665, 57 L. ed. 1015, 33 Sup. Ct. Rep. 712; *Bacon v. Illinois*, 227 U. S. 504, 57 L. ed. 615, 33 Sup. Ct. R. 299; *General Oil Co. v. Crain*, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475; *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 66 L. ed. 975, 42 Sup. Ct. Rep. 570."

In the case of *Utah Power & Light Co. v. Pfost*, 286 U. S. 163, 76 L. ed. 1038, Mr. Justice Sutherland delivering the opinion of the court, said:

> "It is apparent that in the last analysis the question we are called upon to solve is this: Upon the facts of the present case is the generation of electrical energy, like manufacture or production generally, a process essentially local in character and complete in itself; or is it so linked with the transmission as to make it an inseparable part of a transaction in interstate commerce? From the strictly scientific point of view the subject is highly technical, but in considering the case, we must not lose sight of the fact that taxation is a practical matter and that what constitutes commerce, manufacture or production is to be determined upon practical consideration."

In the case of *State of Minnesota v. Blasius*, No. 7, October Term 1933, decided November 6th, 1933, not yet officially reported, the Court found the facts as follows:

> "The material facts, as found by the trial court, are these: At the St. Paul Union Stockyards, thousands of head of livestock arrive daily

by railroad and truck and are promptly sold and moved. The livestock comes from the state of Minnesota and other States throughout the northwest. The class of livestock which Blasius buys on the market are those that go immediately thereafter into the hands of feeders or growers within and without the State. He has not dealt in livestock for immediate slaughter. Thus, it was the practice of Blasius to go upon the market at the stockyards and buy livestock to meet the requirements of his trade, and in the regular course of his business practically all cattle purchased by him were sold and shipped to non-residents of the State, although selling and shipping to residents of the State did sometimes occur.

"The eleven head of cattle in question came to the yards from some point outside the State of Minnesota; they had been consigned to commission firms for sale at the South St. Paul market; the consignors 'had no intent to transport said cattle to any other place than South St. Paul, nor did have any intent that such cattle should be transported to any particular place after their sale'; they were bought by Blasius from the commission merchants on April 30th, 1929, and on May 1st, 1929, the tax date, they were owned by him and 'had not been entered with any carrier for shipment to any point', but were being offered for sale on the market; seven of the eleven head were sold on that day to a non-resident purchaser and were immediately shipped by the purchaser to points outside the State of Minnesota; the remaining four head were similarly sold and shipped on the following day. After his purchase Blasius placed the cattle in pens leased by him from the

stockyards company; he paid for their feed and water up to the time of resale."

The Court held as follows:

"But because there is a flow of interstate commerce which is subject to the regulating power of Congress, it does not necessarily follow that, in the absence of a conflict with the exercise of that power, a state may not lay a non-discriminatory tax upon property which, although connected with that flow as a general course of business, has come to rest and has acquired a situs within the State. The distinction was recognized in *Stafford v. Wallace*, supra, pp. 525, 526, where the Court cited, as an illustration, the case of *Bacon v. Illinois*, 227 U. S. 504, in which such a non-discriminatory property tax was sustained. And the Court in the Stafford case quoted from the opinion in the Bacon case (supra p. 516) the following statement of the distinction: 'The question' (that is, as to the validity of the state tax) 'it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority.'

* * * * * * *

"If the interstate movement has not begun the mere fact that such a movement is contemplated does not withdraw the property from the State's power to tax it. *Coe v. Errol*, 116 U. S. 517; *Diamond Match Co. v. Ontonagon*, 188 U. S. 82. If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxa-

tion, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement. *Coe v. Errol*, supra; *Kelly vs. Rhoads*, 188 U. S. 1; *Champlain Company v. Brattleboro*, 260 U. S. 366. Formalities, such as the forms of billing, and mere changes in the method of transportation do not affect the continuity of the transit. The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied. *Champlain Company v. Brattleboro*, supra, p. 377; *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498; *Texas & N. O. R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111; *Carson Petroleum Co. v. Vial*, supra. The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if it appears 'that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation'. *Hughes Bros. Co. v. Minnesota*, 272 U. S. 469, 476."

The case at bar is the same in principle as the Minnesota case; that is, the cotton is purchased by the cotton buyer at a time when such cotton is a part of the general mass of property in the State, and at a time when said cotton has not yet begun its interstate movement.

My contention is, therefore, that where the property in subject to an ad valorem tax, then a person dealing in such property may be required to pay an excise or privilege tax for so doing.

Brown v. Maryland, 12 Wheat, 419, 6 L. Ed. 678. In this case, which is a leading case on the question, the opinion of the Court being delivered by Chief Justice Marshall, the Supreme Court of the United States was considering a privilege tax required of an importer to sell goods imported into the State of Maryland. The Court held that the goods were imported and that at the time the tax accrued had not become a part of the general mass of the property in the State of Maryland. An ad valorem tax, therefore, could not be collected, and inasmuch as an ad valorem tax could not be collected, then a privilege tax could not be required to sell such property. The Court holding as follows:

> "But if it should be proved that a duty on the article itself would be repugnant to the constitution, it is still argued that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more.
>
> "It is impossible to conceal from ourselves that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347. The State of Missouri enacted a statute taxing the right to sell goods, wares and merchandise which was not the growth, product or manufacture of the State of Missouri. The Supreme Court, in determining this case, cited with approval the case of *Brown v. Maryland*, supra, and held as follows:

"So, in like manner, the license tax exacted by the State of Missouri from dealers in goods which are not the product or manufacture of the State, before they can be sold from place to place within the state, *must be regarded as a tax upon such goods themselves*; and the question presented is, whether legislation, thus discriminating against the products of other states in the conditions of their sale by a certain class of dealers, is valid under the Constitution of the United States."

Kehrer v. Stewart, 109 U. S. 60, 49 L. Ed. 663. In this case the Supreme Court of the United States was considering a privilege tax levied by the State of Georgia upon a person engaged in selling meat in said state. It appears that Nelson Morris & Company, citizens of Illinois, had a place of business in the State of Georgia; that it employed clerks or agents to sell its meats in the State of Georgia. Some of the meats were ordered by these agents from the company and delivered direct to the consumer or purchaser. The Court held that was interstate commerce and not taxable. The company also shipped meats to the agents and these meats were sold to local customers. The Court held that this was not intertsate commerce and was subject to the prviilege tax levied by the state. The Court held as follows:

"It was admitted by the supreme court of Georgia, in its opinion, and by both parties hereto, that a tax upon the seller of goods is a tax upon the goods themselves (*Brown vs. Maryland*, 12 Wheat. 419, 6 L. Ed. 678; *Welton vs. Missouri*, 91 U. S. 275, 23 L. Ed. 347). * * * *

"This decision was correct. In carrying on the domestic business, petitioner was indistinguishable from the ordinary butcher, who slaughters cattle and sells their carcasses, and in principle it made no difference that the cattle were slaughtered in Chicago and their carcasses sent to Atlanta for sale and consumption in the ordinary course of trade. Upon arrival there they became a part of the taxable property of the state. It made no difference whence they came and to whom they were ultimately sold."

Eastern Air Transport v. S. C. Tax Commission, 52 Fed. (2nd) 456. The State of South Carolina levied a privilege tax on the sale of gasoline. The Eastern Air Transport was engaged in interstate commerce and bought gasoline from a concern in South Carolina and was required to pay the sales tax thereon. The suit was brought on the theory that the Transport Company was not liable for the tax inasmuch as the gasoline was used in interstate commerce. The Court held as follows:

"We attach no importance to the fact that the tax is described in the statute as a privilege or license tax; for, where such tax is measured by sales, it is in effect a sales tax, whatever it may be called. *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 222, 48 S. C. 451, 72 L. ed. 857, 56 A. L. R. 583. And, although not a property tax within the meaning of the South Carolina Constitution, but an excise tax (*Gregg Dyeing Co. v. Tax Commission* (C. C.) ..... S. E. .....), it must be treated as in effect a tax upon the property sold for determining questions arising under the federal Constitution. *Fahrer v. Stewart*, 197 U. S.

60, 25 S. St. 403, 49 L. ed. 663; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Brown v. Maryland*, 12 Wheat. 425, 6 L. ed. 678. But the rule is that the right of a state to tax property within its borders or transactions therein occurring is practically unlimited, except that it may not tax interstate commerce or burden such commerce by taxing the instrumentalities used in carrying it on or violate other constitutional provisions not here material. The sale, being completed within the state of South Carolina, is, of course, not a transaction in interstate commerce. The question in the case, then, comes to this, whether at the time of the sale, which is the transaction by which the tax is measured, the gasoline which is the subject of the sale can be regarded as an instrumentality of such commerce."

The opinion of the District Court was affirmed by the Supreme Court of the United States, the opinion being reported in 285 U. S. 147, 76 L. ed. 673. The Supreme Court held as follows, and cited in support of said holding the cases hereinbefore cited and quoted from:

"If such a license tax for the privilege of making sales within the state were regarded as in effect a tax upon the goods sold, its validity could not be questioned in the circumstances here disclosed, as in that aspect the tax would be upon a part of the general mass of property within the state and hence subject to the State's authority to tax, although the property might actually be used in interstate commerce."

In the case of *Edelman v. Boeing Air Transport*, No.

289, U. S. 249, 77 L. ed. 1155, the Court held as follows:

"Respondent maintains an airplane service for transportation in interstate commerce of passengers, mail and express with airports at Cheyenne and Rock Springs. It purchases gasoline both within and without the State, which it intermingles and stores in tanks at the two airports. It pays the tax without objection on the gasoline which it purchases within the state, and on which the tax has not been paid by the wholesaler, as well as on all gasoline which it sells within the State at its airports or withdraws from the tanks for local use. But it contends, and the court below held, that the tax cannot validly be applied to the gasoline imported from outside the State, stored in tanks at the airports and used for 'filling' the interstate airplanes in which it is eventually consumed.

* * * * *

"As the statute has been administratively construed and applied, the tax is not levied upon the consumption of gasoline in furnishing motive power for respondent's interstate planes. The tax is applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. No tax is collected for gasoline consumed in respondent's planes either in coming into or on going out. It is at the time of withdrawal alone that 'use' is measured for the purposes of the tax. The stored gasoline is deemed to be 'used' within the State and therefore subject to the tax, when it is withdrawn from the tanks. Compare No. 176, *Nashville C. & St. L. R. Co. v. Wallace*, decided February 6, 1933 (288 U. S. 249, ante, 730, 53 S. Ct. 345); *Gregg Dyeing*

Co. v. Query, 286 U. S. 472, 76 L. ed. 1232, 52 S. Ct. 631, 84 A. L. R. 831; *Hart Refineries v. Harmon*, 278 U. S. 499, 73 L. ed. 475, 49 S. Ct. 188; *Bowman v. Continental Oil Co.*, 256 U. S. 642, 65 L. ed. 1139, 41 S. Ct. 606.

"A state may validly tax the 'use' to which gasoline is put in withdrawing it from storage within the state, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. Such a tax cannot be distinguished from that considered and upheld in No. 176, *Nashville, C. & St. L. R. Co. v. Wallace*, supra. There it was pointed out that 'there can be no valid objection to the taxation of the exercise of any valid right or power incident to . . . ownership of the gasoline which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson v. Kentucky*, 279 U. S. 245, 73 L. ed. 683, 49 S. Ct. 279.' As the exercise of the powers taxed, the storage and withdrawal from storage of the gasoline, was completed before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce to transgress constitutional limitations."

American Airways, Inc., vs. Grosjean, No. 546, October Term 1933, was a case similar to the one last cited, and was affirmed recently by this Court on the authority of the last cited case.

From the record in this case it appears clearly and beyond controversy that at the time the cotton is bought by

appellant that it is a part of the general mass of property in the State of Mississippi; that it is subject to the jurisdiction of the State; that it is liable for an ad valorem tax, and under the principles of law announced in the above cited cases, the appellant, dealing in or purchasing said cotton as set out in the record in this case may be required to pay a privilege tax for so doing and that such tax is not a burden upon nor a regulation of interstate commerce.

POINT IV.

AN AD VALOREM TAX MAY BE LEVIED UPON THE COTTON AT ANY TIME BEFORE THE COTTON ENTERS THE CHANNELS OF INTERSTATE COMMERCE AND A PRIVILEGE TAX MAY BE LEVIED UPON THE PERSON ENGAGED IN THE BUSINESS OF BUYING SUCH COTTON AT ANY TIME BEFORE IT ENTERS THE CHANNELS OF SUCH COMMERCE.

After a careful and diligent search of the authorities I have been unable to find any decision of the Supreme Court of the United States where the facts are on all fours with the facts in this case; that is, I have not been able to find a decision which construes a statute which imposes a privilege tax or an excise tax upon the right to purchase property in one State, which afterwards is sold in interstate commerce. However, there are numerous cases that, in my opinion, are analagous to the principle herein contended for. That is that line of cases which construes statutes which levy a privilege tax on the right to sell property that has been transported in interstate commerce into the state levying a tax.

The rule is well settled that where goods are shipped from another state into the taxing state that either an ad valorem tax on the goods or a privilege tax for selling the goods may be levied as soon as such goods come to rest within the taxing state.

Woodruff vs. Parham, 75 U. S. 123, 19 L. ed. 382. The City of Mobile levied a privilege tax on commissioner merchants and auctioneers. The plaintiff in said cause had sold as auctioneer and commissioned merchant a large amount of goods for others and also on his own account, and claimed that as to such goods as were brought into the State of Alabama from other states of the Union and sold by him at wholesale in the original and unbroken packages that he was not liable for the tax; that the ordinance attempting to tax him was in violation of the Constitution of the United States.

I desire to emphasize the fact in this case that the plaintiff was selling goods for a non-resident of the State and that such goods had been shipped into the State of Alabama by interstate commerce. However, the Court after reviewing numerous decisions held that the statute was constitutional and the plaintiff was liable for the tax. This was clearly a tax on the right to sell goods that had been introduced into the state in interstate commerce. The Court held as follows:

> "Whether we look, then, to the terms of the clause of the Constitution in question, or to its relation to other parts of that instrument, or to the history of its formation and adoption, or to the comments of the eminent men who took part in

those transactions, we are forced to the conclusion that no intention existed to prohibit, by this clause, the right of one state to tax articles brought into it from another. If we examine for a moment the results of an opposite doctrine, we shall be well satisfied with the wisdom of the Constitution as thus construed.

"The merchant of Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all state, county and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the State nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts who deals only in wholesale, if he purchases his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all the citizens."

See also *Hinson vs. Lott*, 75 U. S. 148, 19 L. ed. 387, wherein it was held that a person who sold whiskey in Alabama in the original package after such whiskey had been shipped to him in interstate commerce and owned by a non-resident of the State, was liable for a privilege tax for selling such whiskey.

Brown vs. Houston, 114 U. S. 622, 29 L. ed. 257. A resident of the State of Pennsylvania shipped coal to the

City of New Orleans in Louisiana in barges. The agents of the owner of the coal kept such coal, delivered it on the barges and sold same only in barge load lots. The taxing authorities of Louisiana undertook to levy and collet an ad valorem tax on the coal. The Court held as follows:

> "This being the recognized law, the question then arises whether the assessment of the tax in question amounted to any interference with or restriction upon the free introduction of the plaintiff's coal from the State of Pennsylvania into the State of Louisiana, and the free disposal of the same in commerce in the latter State; in other words, whether the tax amounted to a regulation of, or restriction upon, commerce among the states; or only to an exercise of local administration under the general taxing power, which, though it may incidentally affect the subjects of commerce, is entirely within the powers of the State until Congress shall see fit to interfere and make express regulations on the subject.
>
> "As to the character and mode of the assessment, little need be added to what has already been said. It was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that state to some other place place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year, or two years, or only for

a day. It had become a part of the general mass of property in the state, and as such it was taxed for the current year (1880) as all other property in the City of New Orleans was taxed. Under the law, it could not be taxed again until the following year. It was subjected to no discrimination in favor of goods which were the products of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated."

This was an attempt by the State of Louisiana to collect an ad valorem tax on the coal in question. However, under the principles of law announced in the decisions cited under Division III of this brief, a privilege tax could have been levied as well.

American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538. The American Steel and Wire Company was a corporation created under the laws of New Jersey, its situs being in the State of New Jersey but its principal office was situated in Chicago, Illinois. This corporation manufactured wire nails, etc., and shipped these goods in large quantities to Patterson Transfer Company, Memphis, Tennessee. The Transfer Company acted as the agent of the manufacturer; that is, the Transfer Company would receive and store the articles in question. The manufacturer would procure orders for such goods in Tennessee, Mississippi, and other states, and the manufacturer would then give the Patterson Transfer Company notice of the purchaser and the amount, quality and kind of goods purchased. The Transfer Company would then make delivery.

It will be noted that the Transfer Company only received these goods and delivered them on instruction from the owner thereof; that the owner was a non-resident of the State of Tennessee, shipped the goods to Memphis in interstate commerce and after selling them, they were delivered in interstate commerce.

The statues of Tennessee levied a general ad valorem tax upon all property in the State, and it also levied a merchan'ts tax or merchant's privilege tax on merchants in Tennessee. The term "merchant" is defined by the statute and quoted in the opinion.

The State of Tennessee undertook to collect on the goods hereinbefore mentioned a general ad valorem tax and also the merchants privilege tax.

The American Steel & Wire Company paid the tax in question under protest and sued to recover same. The Supreme Court of the United States denied recovery, holding as follows:

> "Assuming that the goods concerning which the state taxes in this case were levied were in the original packages and had not been sold, if the bringing of the goods into Tennessee from another state constituted an importation, in the constitutional signification of that word, it is clear that they could not be directly or indirectly taxed. But the goods not having been brought from abroad, they were not imported in the legal sense, and were subject to state taxation after they had reached their destination and whilst they were held in the state for sale. This is as conclusively

foreclosed by the decisions of this court as is the doctrine resting upon the decision in *Brown v. Maryland; Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091. The doctrine upon upon which the cases rest was this,—that imports, in the constitutional sense, embrace only goods brought from a foreing country, and consequently do not include merchandise shipped from one state to another. The several states, therefore, not being controlled as to such merchandise by the prohibition against the taxation of imports, it was held that the states had the power, after the goods had reached their destination and were held for sale, to tax them, without discrimination, like other property situated within the state."

Banker Bros. Co. vs. Pennsylvania, 222 U. S. 210, 56 L. Ed. 168. The Banker Brothers Company was a corporation doing business in Pittsburg, Pennsylvania. The George M. Pearce Company was a corporation engaged in the business of manufacturing automobiles in Buffalo, New York. The Pearce Company agreed to sell Banker Brothers Company automobiles at 20% less than the list price. Banker Bros. Company did not keep any automobiles in stock. It would secure orders from residents of Pennsylvania. When the order was secured it would transmit the down-payment to the Pearce Company with the order for the automobile. If the Pearce Company accepted the order it would ship the automobile ordered to Banker Bros. Company in Pennsylvania. The Banker Bros. Co. would deliver it to the purchaser.

The statutes in Pennsylvania levied a privilege tax of 1% on sales of automobiles in Pennsylvania. The State

undertook to collect this 1% tax on $351,000.00, the amount of sales made in the manner herein outlined. The Company undertook to defeat the payment of the tax on the ground that it was engaged in interstate commerce.

The Supreme Court held that the sale of the automobiles was made in Pensylvania; that when the railroad company delivered the automobile to Banker Bros. Company that it had come to rest in the State of Pennsylvania; that it was bought in Pennsylvania and subject to be taxed in said State. The Court upheld the levy of said tax.

This case is clearly analagous to the case at bar. In the case cited the Banker Brothers Company procured a contract with the Pearce Company by which it agreed to sell Banker Brothers automobiles when ordered. In other words, the Banker Brothers Company had a contract to purchase the automobiles from the Pearce Company before it made any contracts for the sale thereof in Pennsylvania. The order by the purchaser was given to Banker Brothers Company when the car was in another state. It was shipped from such other state to the taxing state in interstate commerce. It is clear that both Banker Brothers Company and the Pearce Company were engaged in interstate commerce. However, the Court held that inasmuch as the automobile, as soon as it was delivered to Banker Brothers Company, was taxable in the State of Pennsylvania, that such state might levy a privilege tax to sell such automobile.

Wagner vs. Covington, 251 U. S. 99, 64 L. ed. 157. This was a suit by the manufacturer of soft drinks to recover taxes paid for the privilege of selling soft drinks at wholesale. The soft drinks were manufactured in Ohio and

transported by wagon into Kentucky and there sold in the original package from the wagon. The Court held that the tax was valid.

Sonneborn Bros. vs. Keeling, 262 U. S. 506, 67 L. ed. 1095. The Court states the question and its decision as follows:

> "The question we have to decide is whether oil transported by appellants from New York or elsewhere outside of Texas to their warerooms or warehouse in Texas, there held for sales in Texas in original packages of transportation, and subsequently sold and delivered in Texas in such original packages, may be made the basis of an occupation tax upon appellants, when the state tax applies to all wholesale dealers in oil engaged in making sale and delivery in Texas.
>
> "Our conclusion must depend on the answer to the question: Is this a regulation of, or burden upon, interstate commerce? We thing it is neither. The oil had come to a state of rest in the warehouse of the appellants, and had become a part of their stock, with which they proposed to do business as wholesale dealers in the state. The interstate transportation was at an end, and whether in the original packages or not, a state tax upon the oil as property, or upon its sale in the state, if the state law levied the same tax on all oil or all sales of it, without regard to the origin, would be neither a regulation nor a burden on the interstate commerce of which this oil had been the subject."

Gulf Fisheries vs. MacInerney, 278 U. S. 124, 72 L. ed. 495. The State of Texas enacted a statute and levied a privilege tax on the privilege of selling fish. The amount of the tax was fixed by the amount of the fish sold. The Court stated the facts and held as follows:

> "The fish are caught in the Gulf of Mexico and are landed, in bulk, by the fishing boats on the wharf of the Galveston Wharf Company. That is the Gulf Fisheries Company's only place of business. And there it has the privileges required for the conduct of its business. It has space for unloading the fish; has several large bins or ice boxes for storage, handling and reicing; has space for loading fish on express cars; and has space for the office work incident to the loading, selling and shipping. After the fish are unloaded from the vessels, all are weighed and washed. All are immediately re-iced to prevent spoiling. About 75 per cent are there beheaded and gutted; 7 to 10 per cent are gutted and gilled with heads on; the remainder are left for sale without beheading or removing gills or entrails. All, except 15 or 20 per cent which are sold to wholesale dealers within the city, are put into barrels, loose with ice, ready for shipment in filling orders. None are placed in cold storage plants. All are shipped from the wharf as fast as they can be re-iced, washed, handled and loaded as above stated. Nearly all are shipped on the day they are unloaded from the boats. Occasionally, some are held in the ice boxes on the wharf for more than forty-eight hours. All are sold to wholesale dealers in quantities of from 50 to 400 pounds. None are sold to retailers.

"The tax is laid, not according to the weight of the fish when landed, but upon the fish sold. All that is sold, has been handled as above stated. None of it has remained in its original condition. None is in the original package, and little in its original form. This is obviously true of the 75 per cent which is beheaded and gutted and of the 7 to 10 per cent more which is gutted and gilled with the heads on. But the small remainder is, when sold, no longer in its original condition. Before sale, it is washed and re-iced. It is taken from the bulk and put loose with ice in barrels. And all this has been done on the wharf. These facts make inapplicable cases like *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Low v. Austin*, 13 Wall. 29, 20 L. ed. 517; *Cook v. Pennsylvania*, 97 U. S. 566, 23 L. ed. 1015. All the fish sold have, after landing and before laying the tax, been so acted upon as to become part of the common property of the state. They have lost their distinctive character as imports and have become taxable by the state. Compare *Sonneborn Bros. v. Cureton* (*Sonneborn Bros. v. Keeling*) 262 U. S. 506, 67 L. ed. 1095, 43 Sup. Ct. Rep. 643."

This case is clearly analagous to the case at bar. It appears from the record in the case at bar that the appellant sells a part of the cotton purchased in Mississippi to persons in foreign countries. However, it further appears that the cotton is purchased and delivery is made by the seller in the State of Mississippi, and after the appellant has acquired title to and possession of the property, then it is compressed before being shipped out of the State. The transaction is clearly a local transaction and the cotton is

not shipped out in the original package or original condition, or in the same form as when purchased. If it can be said, as it was said in the above mentioned case, that washing and re-icing fish changes the original package, or changes the form, then clearly compressing cotton for exportation changes it in both form and package, and the appellant would clearly be liable for the tax for purchases made in Mississippi.

REPLY TO APPELLANT'S BRIEF

Practically all of appellant's brief has been answered in the arguments heretofore made, and such arguments will not be repeated here.

However, under Point II of appellant's brief, they contend that "the privilege tax levied being inseparable and indivisible cannot be exacted from appellant should it be held a part of the business of appellant is in interstate commerce."

Under this point counsel for appellant admit that the supreme Court of the State has held that the intrastate business of appellant may be taxed and that it has been taxed by the ordinance and statutes in question, and that this Court is bound to follow the decisions of the Supreme Court of Mississippi.

Plaintiff, however, contends as follows: "We, however, submit that where the business is inseparable and indivisible the so-called intrastate commerce is a concomitant and inextricable part of the interstate business, and where one cannot be carried on without the other, the tax is unenforceable."

On page 12 of the record, it is shown that it is the custom among cotton buyers and producers that when a producer has a number of bales of cotton that all of the cotton is sold even though a part of it cannot be used to fill the contracts made theretofore by the purchaser. However, this is merely a custom and it certainly cannot be said that a cotton buyer would be required to purchase any part of the cotton for which he did not have a contract.

In making this argument counsel evidently have reference to the purchase of what is referred to in the record as "overs". However, the Supreme Court of Mississippi held that appellant was engaged in intrastate commerce when purchasing about thirty per cent of the cotton purchased; that is, the purchase of the cotton trucked or hauled into the compress at Greenwood was an intrastate transaction as well as the purchase of such "overs."

We contend that inasmuch as the appellant purchased the cotton before it entered the channels of interstate commerce and while it was a part of the general mass of property in the State of Mississippi that the purchase of all of such cotton was intrastate commerce and not interstate commerce.

In *N. O. M. C. R. R. Co. v. State*, 110 Miss. 290, the Supreme Court of Mississippi construed a statute which levied a privilege tax at so much per mile on railroads operating in the State to be a tax on intrastate commerce and not on interstate commerce. The Court stated as follows:

> "Taking the act by the four corners and keeping in view the object to be attained, we find

this statute a part of the general scheme for levying privilege taxes on the several and various kinds of business, trades, and professions done, practiced and carried on in Mississippi. The state in its sovereign capacity is exacting from those who do business and practice and enjoy their several trades and professions a tax as a condition precedent to the right of exercising the privileges. The subject of the tax in each case is the party or corporation doing business, plying his trade, or practicing his profession in Mississippi, and not, of course, in a foreign state or country. The business sought to be taxed is, in each instance, the business done within the confines of our own state. In the case of appellant the tax sought to be imposed was certainly intended to be upon the business enjoyed by it in Mississippi and as a domestic corporation. Every intelligent man knows, and the legislature in enacting this law well knew, that a tax could not be imposed by our legislative department on interstate commerce and that no law could be passed burdening interstate commerce or seriously embarrassing railroads in doing such business, or in doing business for the United States government. It is, therefore, unreasonable to assume that the legislature had any intention of burdening or embarrassing interstate commerce."

In *Pullman Company vs. Adams,* 78 Miss. 714, the State statute levied a privilege tax upon Pullman Companies operating cars in the State of Mississippi and fixed the tax at so much a mile. The company contended that its intrastate business was done at a loss and the tax was

a burden on interstate commerce. The Court held the tax valid as follows:

> "The company in this case need take out no license and pay no tax for doing interstate business, and the statute is therefore valid. In *Telegraph Co. v. Wirt Adams, Revenue Agent*, 71 Miss. 565, afterwards affirmed by the United States Supreme Court, this court said: 'Exery tax is a burden, and to the extent imposed, is an interference with the pursuit of business upon which it is laid. If the business is partly interstate commerce, then that commerce is incidently affected and interfered with by every tax, of any nature whatever, that may be levied on it. In the case at bar there is no direct burden upon interstate commerce; there is no further interference with it than will be found necessary to result from the imposition of any burden of taxation in any shape'."

In each of the above cited cases the two classes of business were inseparable; that is, neither of said companies would have engaged in intrastate commerce if it had not been necessary to or an incident to its interstate commerce.

It had been the custom of the Pullman company to do this intrastate business, but the Court sustained the tax.

We, therefore, conclude that the fact that two classes of business are closely allied and the fact that appellant engages in intrastate commerce solely because he is engaged in interstate commerce will not allow him to escape the tax of which he complains.

CONCLUSIONS

We, therefore, most respectfully submit that the privilege tax levied by the laws of Mississippi and the ordinances of the City of Greenwood are:

1. The valid exercise of the power of the State and City to tax.

2. That said tax does not impose a burden on interstate commerce.

3. That a person who is engaged in the business of the purchase of cotton when such cotton is a part of the mass of property in Mississippi and before it has entered the channels of interstate commerce is not engaged in interstate commerce.

We, therefore, most respectfully submit that the opinion of the Supreme Court of Mississippi should be affirmed.

Respectfully submitted,

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